STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

OFFICIAL

AFFIDAVIT OF PERSONAL SERVICE

Janet M. Bresnahan, being first duly sworn, hereby deposes and says:

That at the City of Minneapolis, county and state aforementioned, on the 1st day of November, 1985, she did serve the Report of the Chief Administrative Law Judge and the Report of the Administrative Law Judge, and a three volume transcript

upon Leonard Levine

by personally handing to Chuck Osell

, and said Reports, transcript, record

.

(Signature)

Subscribed and sworn to before me
this 1st day of November, 1985

(Notary)

SANDRA A. HAVEN
NOTARY PUBLIC-MINNESOTA
RAMSEY COUNTY
MY COMMISSION EXPIRES AUGUST 21, 1990

HCFA-179 # 86-3 Date Rec'd 3-20-86
Supercedes _____ Date Appr. 7-22-86
State Rep. In. V.2.1 Date Eff. 1-1-86

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
400 SUMMIT BANK BUILDING
310 FOURTH AVENUE SOUTH
MINNEAPOLIS, MINNESOTA 55415
(612) 341-7600

OFFICIAL

November 1, 1985

Leonard Levine, Commissioner
Department of Human Services
4th Floor, Centennial Office Building
658 Cedar Street
St. Paul, MN 55155

RE: Rule 53; OAH Docket No. HS-86-001-JL.

Dear Commissioner:

Enclosed and served upon you personally, please find the Report of the Chief Administrative Law Judge and the Report of the Administrative Law Judge in the above-entitled matter. I also enclose the official record and a three volume transcript, and I am closing our file in this matter.

Yours very truly,

Jon L. Lunde

JON L. LUNDE
Administrative Law Judge

Telephone: 612/341-7645

JLL:jmb
enc.
cc: Gary Van Cleve

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HS-86-001-JL

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN SERVICES

In the Matter of the Proposed Adoption of Department of Human Services Rules Governing the Determination of Payment Rates for Intermediate Care Facilities for Persons with Mental Retardation, Minnsota Rules Parts 9553.0010 to 9553.0080.

REPORT OF THE CHIEF ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for review by the Chief Administrative Law Judge pursuant to the provisions of Minn. Stat. § 14.15, subds. 3 and 4, which provide:

> Subd. 3. Finding of substantial change. If the [administrative law judge's] report contains a finding that a rule has been modified in a way which makes it substantially different from that which was originally proposed, or that the agency has not met the requirements of sections 14.131 to 14.18, it shall be submitted to the chief administrative law judge for approval. If the chief administrative law judge approves the finding of the administrative law judge, the chief administrative law judge shall advise the agency and the revisor of statutes of actions which will correct the defects. The agency shall not adopt the rule until the chief administrative law judge determines that the defects have been corrected.
>
> Subd. 4. Need or reasonableness not established. If the chief administrative law judge determines that the need for or reasonableness of the rule has not been established pursuant to section 14.14, subdivision 2, and if the agency does not elect to follow the suggested actions of the chief administrative law judge to correct that defect, then the agency shall submit the proposed rule to the legislative commission to review administrative rules for the commission's advice and comment. The agency shall not adopt the rule until it has received and considered the advice of the commission. However, the agency is not required to delay adoption longer than 30 days after the commission has received the agency's submission. Advice of the commission shall not be binding on the agency.

Based upon a review of the record in this proceeding, the Chief Administrative Law Judge hereby approves the Report of the Administrative Law Judge with the following modifications and additional comments:

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20. This Finding is approved as it relates to the vagueness of the rule. A reading of the definition, other related rules, the SONR and the record fails to disclose the intent of the Agency. The Agency must clarify this rule to cover several points. First, if the central or administrative office for a facility is located on the premises of the facility, is it to be included as part of the "physical plant" or must it be broken out and considered under the rule for central, affiliated or corporate office costs? Second, if a corporation (partnership, etc) has more than one facility but its central office, from which all facilities are run, is physically located on the premises of one of the facilities, is it to be treated as part of the "physical plant" of that facility? Rules must be specific so that those regulated by the rules will have certainty and will not be left to the mercy of the regulators and subsequent interpretations of the "intent" of the rules. The proposal by the Administrative Law Judge in Finding 20 may clarify the rule, but the Agency should consider all possible problems which they can reasonably be expected to anticipate based on their past experience, and amend the rule accordingly.

64. This Finding is approved on the basis of vagueness. In correcting the defect, the Agency must also make it clear that the second paragrpah is an exception to the general rule as stated in the first paragraph. This particular subpart prohibits a "mark-up" in sales from a related organization except when that related organization sells to other, nonrelated organizations. As presently drafted, it could create a lack of uniformity of interpretation of the intent of the subpart. Because of the complexity of these rules and the history of numerous appeals from rate determinations in the past, every effort must be made to remove any ambiguity or doubt in the minds of those regulated as well as those enforcing the rules. The Agency has, in its Statement of Need of Reasonableness, stated as much in terms of its goals in proposing these rules.

66. This Finding is approved. In order to correct the defect, the Agency must allow repair costs necessitated by destructive resident behavior, regardless of amount, to be included in the program cost category. This can be corrected by adding a new sentence at the end of Subpart B to read as follows:

> Repairs necessitated solely as a result of destructive resident behavior, regardless of cost, shall be allowed as a program operating cost.

113. The conclusion that the unfettered discretion given to the Commissioner for granting an extension to submit additional information is approved. However, the proposal for correcting the defect is not approved. "Good cause," as an undefined standard, leaves unfettered discretion to the Commissioner. In order to correct the defect, the sentence on page 34, line 32 and ending on line 36 must be amended to read as follows:

> The commissioner shall extend this time if the facility submits a written request and if the extension of time will not prevent the commissioner from establishing rates in a timely manner.

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127. This Finding requires the deletion of the last sentence in Rule 9553.0050, subp. 1, A(1)(F). I agree with the deletion, not only for the reasons given but for the additional ambiguity. The sentence could be read to place a restriction on the otherwise automatic, annual recalculation to once every five years. Such a reading would defeat the intent and purpose of the rest of the subitem which is to allow annual increases based upon a stated formula. The record is unclear with respect to the Agency's intent in adding this sentence. Thus, it must be deleted.

142. This Finding is approved. In order to correct the defect in this rule, it must be redrafted to make the intent of the Agency clear and unambiguous. The true intent of the Agency cannot be determined from this record, as discussed by the Administrative Law Judge, because there could be more than one reason for the rule. It is clear that treating purchasers differently solely on the basis of the date they entered the program is improper.

156. The Finding is approved. In order to correct this defect, the rule as originally proposed must be adopted, the amendment being improper. Additionally, the rule must cite the reader to the former rule, 12 MCAR § 2.052D.5.b(1)(a).

In order to correct the defects enumerated by the Administrative Law Judge and the Chief Administrative Law Jugde, the agency shall either take the action recommended by the Administrative Law Judge and the Chief Administrative Law Judge or reconvene the rule hearing if appropriate. If the agency chooses to reconvene the rule hearing, it shall do so as if it is initiating a new rule hearing, complying with all substantive and procedural requirements imposed on the agency by law or rule.

If the agency chooses to take the action recommended by the Administrative Law Judge and the Chief Administrative Law Judge, it shall submit to the Chief Administrative Law Judge and Chief Administrative Law Judge a copy of the rules as initially published in the State Register, a copy of the rules as proposed for final adoption in the form required by the State Register for final publication, and a copy of the agency's Findings of Fact and Order Adopting Rules. The Chief Administrative Law Judge will then make a determination as to whether the defects have been corrected and whether the modifications in the rules are substantial changes.

Should the agency make changes in the rules other than those recommended by the Administrative Law Judge and the Chief Administrative Law Judge, it shall also submit the complete record to the Chief Administrative Law Judge for a review on the issue of substantial change.

Dated: November 1st, 1985.

DUANE R. HARVES
Chief Administrative Law Judge

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STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN SERVICES

In the Matter of the Proposed Adoption of Department of Human Services Rules Governing the Determination of Payment Rates for Intermediate Care Facilities for Persons with Mental Retardation, Minnesota Rules, Parts 9553.0010 to 9553.0080.

REPORT OF THE ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Jon L. Lunde commencing at 9:00 a.m. on Wednesday, August 21, 1985 at the State Office Building, Room 200, in St. Paul, Minnesota, pursuant to an Order for Hearing dated July 2, 1985. Additional hearings were held at the same location on August 22 and 23, 1985.

This is a rulemaking proceeding under Minn. Stat. §§ 14.131 through 14.20 held to determine whether the Agency has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of rules, whether the proposed rules are needed and reasonable, and whether or not the rules, as modified, are substantially different from those originally proposed. At the request of the Administrative Law Judge, the Chief Administrative Law Judge authorized an extension in the due date of this Report to Thursday, October 31, 1985, pursuant to Minn. Stat. § 14.15, subd. 2 (1984).

The Department was represented by Gary Van Cleve, Special Assistant Attorney General, Second Floor, Space Center Building, 444 Lafayette Road, St. Paul, Minnesota 55101. Also appearing on behalf of the Department were Maria Gomez, Director of the Long Term Care Management Division; Charles Osell, Senior Auditor in the Long Term Care Management Division; and Paul Olson, also of the Long Term Care Management Division. Approximately 55 persons attended the hearing which continued until all interested persons, groups and associations had an opportunity to be heard concerning the adoption of the proposed rules. Most of the public input in this proceeding came from representatives of the Association of Residences for the Retarded in Minnesota (ARRM), a trade association representing 280 licensed intermediate care facilities for the mentally retarded (ICF/MRs).

The Department must wait at least five working days before taking any final action on the rules; during that period, this Report must be made available to all interested persons upon request.

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Pursuant to the provisions of Minn. Stat. § 14.15, subds. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Department of actions which will correct the defects and the Department may not adopt the rule until the Chief Administrative Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the Department may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Department does not elect to adopt the suggested actions, it may submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

If the Department elects to adopt the suggested actions of the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, then the Department may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Department makes changes in the rule other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, then it shall submit the rule, with the complete record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

When the Department files the rule with the Secretary of State, it shall give notice on the day of filing to all persons who requested that they be informed of the filing.

Based upon all the testimony, exhibits and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

PROCEDURAL REQUIREMENTS

1. On July 2, 1985, the Department filed the following documents with the Chief Administrative Law Judge:

(a) A copy of the proposed rules certified by the Revisor of Statutes.
(b) The Order for Hearing.
(c) The Notice of Hearing proposed to be issued.
(d) A Statement of the number of persons expected to attend the hearing and the estimated length of the Agency's presentation.
(e) The Statement of Need and Reasonableness.
(f) A Statement of Additional Notice.

2. On Monday, July 22, 1985, a Notice of Hearing and a copy of the proposed rules were published at 10 State Register No. 4, pp. 155 - 183.

3. On July 17, 1985, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with it for the purpose of receiving such notice.

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4. On July 25, 1985, the Department filed the following documents with the Administrative Law Judge:

(a) The Notice of Hearing as mailed.
(b) The Agency's certification that its mailing list was accurate and complete.
(c) The Affidavit of Mailing the Notice to all persons on the Agency's list.
(d) An Affidavit of Additional Notice.
(e) The names of the personnel to represent the Department at the hearing together with the names of any other witnesses solicited to appear on its behalf (none).
(f) A copy of the State Register containing the proposed rules.
(g) A copy of the Department's solication of outside opinion regarding the proposed permanent rules governing the determination of welfare payment rates for residential facilities for the mentally retarded participating in the medical assistance program, which was published on Monday, March 5, 1984 in 8 S.R. 1992. The Department did not receive any responses to this publication; therefore, none were filed with the Administrative Law Judge.

All the documents mentioned above were available for inspection at the Office of Administrative Hearings from the date of filing to the date of the hearing.

5. The initial comment period in this matter remained open through Thursday, September 12, 1985, for the receipt of written comments and statements, the initial comment period having been extended at the hearing to 20 calendar days following its conclusion. The record remained open for an additional three working days, through Tuesday, September 17, 1985, for responses to the comments filed earlier.

6. Mary Martin, counsel for ARRM, argued that the Department failed to comply with the procedural requirements of the Administrative Procedure Act in this proceeding. While admitting that the Department may have complied with the technical requirements of the law, she argued that it did not meet the spirit of the law. She noted that three people at the hearing did not receive the Department's Notice of Hearing and that the Department did not distribute a draft of the proposed rule to ICF/MRs in the state. She said the Department's failure to do that prejudiced providers because a former draft of the rule (dated April 29, 1985), was widely distributed to providers and comments were solicited by the Department on the basis of that draft. Since the rule now proposed by the Department is substantially different from the April 29 draft, she argued that the Department's circulation of the April 29 draft created an expectation among providers that they would be given advance notice and an opportunity to review the final rule before it would be adopted, and that they may have been prejudiced by thinking that the final rule was similar to that proposed in April. She argued that there had been so many drafts of this rule that providers had become confused and were unable to determine which drafts were being circulated seriously for adoption and which ones were not. She also argued that ARRM members had very little involvement in the development of the rule being proposed by the Department, and that for all these reasons it should be withdrawn. Those arguments were not

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persuasive. In the promulgation of rules, state agencies are not required to follow any procedures other than those set forth in the Administrative Procedure Act or the rules of the Office of Administrative Hearings. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978). Whether or not an agency circulates some or all of its drafts, solicits outside opinion prior to commencing rulemaking proceeding, gives complete notice of all of its activities, or undertakes rulemaking proceedings without the prior participation of all affected interests, is one that is largely left to its discretion under the laws of this state. Therefore, in this case, the Department's failure to circulate the final draft of its proposed rule as it had done with prior drafts, its failure to have more involvement with industry representatives prior to proposing the rules to be promulgated and the other failures mentioned by ARRM representatives are not material here. The Agency has discretion as to those matters and is not bound to follow informal procedures they may have followed in the past or to undertake any proceedings not specifically required of it. Although three individuals at the hearing indicated that they did not receive notice of the hearing from the Department, the show of hands made to demonstrate that fact did not establish that the Department failed to give proper notice of the hearing. It is unknown if any of those individuals had registered their names with the Department for the purpose of receiving notice or whether someone else in their organizations may have received the notice that was mailed. Moreover, the mere fact that they appeared at the hearing shows that they were not prejudiced by any defects that occurred. ICF/MRs in the state did thoroughly participate in the rulemaking proceeding and many of them were represented by ARRM, which evaluated and commented upon the rule in considerable detail. Under the circumstances, the Administrative Law Judge can find no procedural defects which would require the Department to reconvene this hearing or which would legally preclude it from promulgating the rule.

INTRODUCTION AND STATUTORY AUTHORITY

7. Minnesota has approximately 330 ICF/MRs serving approximately 5,100 retarded children and adults. It has more ICF/MRs than any other state -- 1/8 of the nationwide total, and more proprietary homes (50%) than any other state. The capacity of these facilities ranges from six beds or less to 164 beds, but the average capacity is 15 beds. They all serve mentally retarded residents, but some specialize in caring for residents with disabilities or those with behavior disorders. In the past, the state has encouraged increases in the number of ICF/MRs in order to reduce the number of residents in state hospitals and to obtain matching federal funds available under the Medicaid Program. Reductions in state hospital populations were required under a series of consent decrees issued by the Federal District Court of Minnesota requiring the State to provide care to mentally retarded persons in the least restrictive fashion possible. By 1983, it was determined that the state may have relied too heavily upon ICF/MRs and that other, less-restrictive alternatives should be developed. In addition, it was determined that the costs of ICF/MR care should be limited or reduced.

8. Laws of Minnesota, 1983, c. 312, art. 9, §§ 1-7 addressed both of these concerns. Among other things, it provided for a moratorium on new ICF/MRs and required the Commissioner to promulgate new rules regulating the

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reimbursement of ICF/MRs under the state's Medical Assistance program. Most of the rulemaking directives in the Act are contained in Minn. Stat. § 256B.501, subds. 2 and 3, which provide as follows:

> Subd. 2. Authority. The commissioner shall establish procedures and rules for determining rates for care of residents of intermediate care facilities for the mentally retarded which qualify as vendors of medical assistance, waivered services, and for provision of training and habilitation services. Approved rates shall be established on the basis of methods and standards that the commissioner finds adequate to provide for the costs that must be incurred for the quality care of residents in efficiently and economically operated facilities and services. The procedures shall specify the costs that are allowable for payment through medical assistance. . . .
>
> Subd. 3. Rates for intermediate care facilities for the mentally retarded. The commissioner shall establish, by rule, procedures for determining rates for care of residents of intermediate care facilities for the mentally retarded. The procedures shall be based on methods and standards that the commissioner finds are adequate to provide for the costs that must be incurred for the care of residents in efficiently and economically operated facilities. In developing the procedures, the commissioner shall include:
>
> (a) cost containment measures that assure efficient and prudent management of capital assets and operating cost increases which do not exceed increases in other sections of the economy;
>
> (b) limits on the amounts of reimbursement for property, general and administration, and new facilities;
>
> (c) requirements to ensure that the accounting practices of the facilities conform to generally accepted accounting priniciples; and
>
> (d) incentives to reward accummulations of equity.
>
> In establishing rules and procedures for setting rates for care of residents in intermediate care facilities for mentally retarded persons, the commissioner shall consider the recommendations contained in the February 11, 1983, Report of the Legislative Auditor on Community Residential Programs for the Mentally Retarded and the recommendations contained in the 1982 Report of the Department of Public Welfare Rule 52 Task Force. Rates paid to supervised living facilities for rate years beginning during the fiscal biennium ending June 30, 1985, shall not exceed the final rate allowed the facility for the previous rate year by more than five percent.

Under Minn. Stat. § 256B.503, the Commissioner is required to promulgate temporary and permanent rules regulating the reimbursement of ICF/MRs pursuant to the provisions of the Administrative Procedure Act.